IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL WRIT PETITION NO.2300 OF 2004

Ramchandra Raghu Naik,
Convict No.C/9556,
present lodged at
Yerawada Central Prison,
Pune, Maharashtra. .... Petitioner

- Versus -

The State of Maharashtra .... Respondent

Shri Arfansait (appointed) for the Petitioner.

Shri D.S. Mhaispurkar, Addl. Public Prosecutor,
for the Respondent.

AND

CRIMINAL WRIT PETITION NO.81 OF 2005

Bindu Ramchandra More,
Billa No.KC-584, age 31 years,
at present undergoing
imprisonment in Kalbha Jail,
Kolhapur, Dist: Kolhapur. .... Petitioner

- Versus -

1. The Deputy Superintendent
of Prison, Western Division,
Kolhapur.

2. The State of Maharashtra
(through the Secretary,
Home Department, Mantralaya,
Mumbai-400 032.) .... Respondents

Shri G.M. Savagave for the Petitioner.

Shri D.S. Mhaispurkar, Addl. Public Prosecutor,
for the Respondent.

CORAM: R.M.S. KHANDEPARKAR &
P.V. KAKADE, JJ.

DATED: FEBRUARY 25, 2005

ORAL JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. In both these petitions common questions of law and facts arise and therefore they were heard together and are being disposed of by this common judgment.

2. Rule. By consent, the rule is made returnable forthwith.

3. The petitioners challenge the orders passed by the authorities below rejecting their applications for furlough leave. The said leave has been rejected mainly on the ground that both the petitioners, who were earlier granted the said leave, had not surrendered themselves and the petitioner in Criminal Writ Petition No.2300 of 2004 came to be arrested after 93 days' of overstay whereas the petitioner in Criminal Writ Petition No.81 of 2005 came to be arrested after 604 days' of overstay.

4. At the outset, the learned Advocates for the petitioners have drawn attention to Rule 2-II(k) of the Bombay High Court Appellate Side Rules, 1960,

hereinafter referred to as "the said Rules", while submitting that such matters are required to be placed before the learned single Judge and cannot be dealt with by a Division Bench.

5. The Rule 2-II(k) of the said Rules reads thus:-

> "Applications/petitions, for furlough or parole under Prison (Bombay Furlough and Parole) Rules, 1959, or for temporary bail in the matter pending before Division Bench or a Single Judge shall be placed before the respective fora. Applications/petitions of aforesaid nature arising out of matters already disposed of shall be placed before the Single Judge assigned with Criminal matters."

The said Clause (k) was incorporated in the said Rules pursuant to the Notification published in the Maharashtra Government Gazette Part IV-C, dated 29-7-1999. Obviously, it came into force from the said day. Plain reading of the said Clause discloses that all the matters relating to furlough or parole leave and bail applications arising in any matter which is pending before Division Bench or a single Judge, the same should

be placed for hearing and disposal thereof before the respective bench and in cases where such applications are filed in the matters already disposed of, then those applications for their disposal are to be placed before the single Judge dealing with criminal matters. Considering the said clause itself, the Advocate for the petitioner would be justified in contending that the present matters which are filed in the disposed of matters, ought to have been placed before a learned single Judge. However, it cannot be done so, as the issue raised on behalf of the petitioners cannot be decided by merely referring to the said clause.

6. In fact, the said clause cannot be read ignoring the main portion of Rule 2 of Chapter I of the said Rules. The same reads that:-

> "2. Matters disposed of by a single Judge -
>
> Save as otherwise expressly provided by these rules, a single Judge may dispose of the following matters:-
>
> I. Civil -
>
> .....

II. Criminal

......"

The Clause (k) is to be found under the heading "Criminal" of Rule 2. The Rule 2 therefore provides that the jurisdiction of a single Judge to deal with the matters enumerated thereunder would be "save as otherwise expressly provided" that is to say, subject to the express provision to the contrary in the said Rules.

7. The said Rules comprise of various Chapters and Chapter XVII thereof deals with the subject of writ petitions under Articles 226 and 227 of the Constitution of India. The Rule 1 of Chapter XVII provides that:-

> "1. (i) Applications for issue of writs, directions, etc. under Article 226 of the Constitution. - Every application for the issue of a direction, order or writ under Article 226 of the Constitution shall, if the matter in dispute is or has arisen substantially outside Greater Bombay, be heard and disposed of by a Division Bench to be appointed by the Chief Justice. ....."

Further, Rule 18 of the said Chapter deals with the powers of the single Judge to deal with the writ petitions and it provides that:-

> "18. Single Judge's powers to finally dispose of applications under Article 226 or 227. - Notwithstanding anything contained in Rules 1, 4 and 17 of this Chapter, applications under Article 226 or under Article 227 of the Constitution (or applications styled as applications under Article 227 of the Constitution read with Article 226 of the Constitution) arising out of -
>
> 1. ......
> to
> 43. ......
>
> May be heard and finally disposed of by a Single Judge appointed in this behalf by the Chief Justice:
>
> Provided when the matter in dispute is or relates to the challenge to the validity of any statute or any rules or regulations made thereunder, such

> applications shall be heard and disposed off by a Division Bench to be appointed by the Chief Justice.
>
> Explanation: The expression "order" appearing in clauses (1) to (41) means any order passed by any judicial or quasi judicial authority empowered to adjudicate under the abovementioned statutes."

8. Being so, Rule 1 of Chapter XVII of the said Rules clearly provides that all writ petitions under Article 226 of the Constitution of India are to be heard by a Division Bench and Rule 18 enumerates exceptions to the same. It is to be noted that the provision under the Rule 1 of Chapter I of the said Rules is subject to express provisions to the contrary in the said Rules. Evidently, Rule 1 of Chapter XVII is expressly contrary to Rule 1 of Chapter I. And, Rule 18 which specifically enumerates the orders which can be considered by the learned single Judge do not include orders relating to furlough or parole leave. Besides, the explanation to Rule 18 specifically clarifies that only judicial and quasi-judicial orders could be subjected to the proceedings before the learned single Judge. Being so, Clause (k) of Rule 1 cannot be read as over-riding the

provisions of Chapter XVII. On the contrary, if the provisions in Chapter I are general provisions, whereas those in Chapter XVII are specific provisions and are to be read as exception to the general provisions.

9. Even though it could be very much desirable that all the matters relating to furlough and parole leave could be conveniently placed before the learned single Judge assigned with criminal matters, since we are governed by the rules as are to be found in the Bombay High Court Appellate Side Rules, 1960 and since the said Rules, as they stand today, do not permit such applications/petitions to be disposed of by a learned single Judge, the point sought to be raised on behalf of the petitioners in that regard is to be rejected.

10. Undoubtedly, the authorities dealing with the applications for furlough leave have to follow the rules framed in that regard by the Home Department and the same are to be found under the Notification No.MIS.5157/74036 (XXIV)-IV, dated 22-6-1959 and Rule 4(10) of the Prisons (Bombay Furlough and Parole) Rules, 1959, hereinafter referred to as "the Furlough Rules" thereunder clearly provides that the prisoners who have at any time escaped or attempted to escape from lawful custody or have defaulted in any way in surrendering themselves at the appropriate time after release on

parole or furlough shall not be considered for release on furlough. Referring to a decision of the Gujarat High Court in the matter of **Bhikhabhai Devshi v. State of Gujarat and others,** reported in AIR 1987 Gujarat 136, it is sought to be contended that the word "shall" appearing in the Rule 4(10) of the Furlough Rules should be read as "may" suggesting that the provision comprised thereunder is not of a mandatory nature but of a directory nature. It is not necessary to go into the controversy as to whether the word "shall" should be read as "may" or not. Suffice to observe that even assuming that the provision comprised under Rule 4(10) is held to be directory, fact remains that in such cases the discretion has to be exercised judiciously. In a case where a prisoner does not report back to the prison after the expiry of the furlough leave period and overstays for a period of 93 days or 604 days, and even thereafter has to be arrested for the purpose of inducting him again in the prison, undoubtedly, it cannot be said that such a person deserves any leniency as regards the Rule 4(10) is concerned. In case of such a person, certainly the Rule 4(10) would apply invariably. It is not to say that even in the case of such person the authorities cannot exercise their discretion. That, however, would depend on facts of each case. For example, in a case where the prisoner is compelled to overstay on account of some serious ailment

or illness, either of himself or his family member, or for some other justifiable cause, certainly an exception can be made. But an overstay without any justification and without any reason can hardly be condoned and, therefore, no unwarranted leniency can be shown to such a person or persons while applying Rule 4(10) of the Furlough Rules.

11. Undisputedly, in the case in hand, the petitioners had overstayed for a period of 93 and 604 days respectively and even thereafter they were required to be arrested for the purpose of their re-induction in the prison. In these facts and circumstances, we do not find any illegality committed by the authorities in rejecting the applications for furlough leave by applying Rule 4(10) of the Furlough Rules.

12. Referring to Section 48A of the Prisons Act, 1894, it was sought to be contended that the petitioners having been already punished under the said provision of the Prisons Act by forfeiting their remission for the period for which they had overstayed, the petitioners could not be again penalised by applying Rule 4(10) as it amounts to double jeopardy. As far as the provisions of law comprised under Section 48A of the Prisons Act are concerned, the same relate to punishment for breach of conditions on which either the sentence is suspended

or remitted or furlough or release on parole is granted. The Clause (3) thereof provides that if any prisoner fails without sufficient cause to observe any of the conditions on which the furlough leave was granted to him, he shall be deemed to have committed a prison offence and the Superintendent may, after obtaining his explanation, punish for such offence by curtailing the privileges admissible under the remission or furlough or parole system. Undisputedly, in the case in hand, on account of overstay by the petitioners after availing the furlough leave, they were punished under the said provision of law comprised under Section 48A of the Prisons Act. However, Rule 4(10) of the Furlough Rules does not speak of any punishment as such. It merely curtails the entitlement of the benefit of furlough leave to the prisoner. In cases where a prisoner continues to commit default in the matter of surrender on expiry of the furlough leave, once having availed the same, the Rule 4(10) provides that prisoners who had at any time escaped or attempted to escape from the lawful custody or defaulted in any way in surrendering themselves at the appropriate time after release on parole or furlough, shall not be released on furlough. Obviously, this does not speak of any punishment as such. It is well-settled that any entitlement prescribed under the statute can be availed within the parameters prescribed under the statute. If the statute

imposes conditions to claim any such benefit under the statute, the same are to be availed on compliance of the conditions and not otherwise. The provisions regarding the entitlement of benefit has to be read along with conditions attached to the same. Being so, the entitlement has to be read along with the conditions provided for. The entitlement of leave would be to the extent it is permissible and would not be available in cases where it is sought to be curtailed by specific provisions in that regard.

13. The Rule 3 of the Furlough Rules deals with the subject of entitlement of furlough. The sub-rule (1) thereof provides that a prisoner, who is sentenced to imprisonment for a period exceeding one year but not exceeding five years, may be released on furlough for a period of two weeks at a time for every year of actual imprisonment undergone. The sub-rule (2) thereof provides that a prisoner, who is sentenced to imprisonment for a period exceeding five years may be released on furlough for a period of two weeks at a time for every two years of actual imprisonment undergone. The first proviso to Rule 3 provides that a prisoner sentenced to imprisonment for more than five years but not to imprisonment for life may be released on furlough every year instead of every two years during the last five years of his unexpired period of sentence. And the

second proviso provides that a prisoner sentenced to life imprisonment may be released on furlough every year instead of every two years after he completes seven years' actual imprisonment. The Note 1 prescribes that the period of imprisonment in the Furlough Rules includes the sentence or sentences awarded in lieu of fine in case the amount of fine is not paid. Further proviso to the said Note provides that if fine is paid during the period of imprisonment and the total sentence thereby reduced to a term not exceeding five years, he shall thereafter be eligible for release every year in accordance with sub-rule (1) instead of every two years under sub-rule (2). The Note 2 provides that the period of imprisonment shall be computed as the total period for which a prisoner is sentenced even though one or more sentences be concurrent. The Note 3 provides that if at any time, a prisoner who could have been granted furlough is either not granted or is refused the same, the period for which he could have been granted the furlough shall not be carried forward but shall lapse. The Note 4 provides that the period of two weeks may be initially extended up to three weeks in the case of prisoners desiring to spend the furlough outside the State of Bombay. And the Note 5 provides that an order sanctioning the release of a prisoner on furlough shall cease to be valid if not given effect to within a period of two months of the date thereof. The Rule 4 of the

Furlough Rules speaks of the categories of prisoners who shall not be considered for release on furlough. There are further rules which make elaborate provisions in relation to furlough leave.

14. Evidently, the rules make elaborate provisions regarding entitlement as well as disentitlement of furlough leave to the prisoner. Merely because under certain circumstances the rule provides that a prisoner would not be entitled to furlough leave, that does not amount to a penal provision so as to contend that the implementation of such provision would amount to double jeopardy in the case of a prisoner who is punished under Section 48A of the Prisons Act. The provisions relating to entitlement or disentitlement of furlough leave do not relate to penal action on the part of the authorities. Besides, punishment for jail offence by the jail superintendent would not even bar the prosecution and punishment in a Court for the same offence because the powers of the jail superintendent are in the nature of administrative authority for maintenance of discipline and to inflict summary punishment for breach of discipline and those proceedings are not judicial proceedings. In a case where a military personnel was tried in Court martial proceedings and being found guilty was sentenced to rigorous imprisonment for one year and subsequently was

dismissed from service in an action taken under the service Rules, the decision was upheld by the Apex Court in **Union of India v. Sunil Kumar Sarkar,** reported in AIR 2001 SC 1092 holding that it does not amount to double jeopardy under Article 20(2) of the Constitution of India and two proceedings operate in two different fields though the crime or the misconduct might arise out of the same act. Hence the contention sought to be raised that on account of the punishment having been imposed under Section 48A of the Prisons Act, the respondents would not be entitled to deny the furlough leave by taking resort to the provisions of law comprised under Rule 4(10) of the Furlough Rules is devoid of substance and has to be rejected.

15. Needless to say that once an application for furlough is rejected, the prisoner may, if he so desire, make a fresh application for furlough, after a period of six months from the date of the rejection of his earlier application. A clear provision in that regard is to be found in Rule 9 of the Furlough Rules. The rejection of the present application by the authorities as also the rejection of the present petition by this Court cannot come in the way of the petitioners in inviting an appropriate order by filing fresh applications, if they so desire. Obviously, in case any such application is filed, the same will have to be decided in accordance

with the provisions of law.

16. In the result, therefore, both the petitions fail and are hereby dismissed. The rule is discharged with no order as to costs.

(R.M.S.Khandeparkar, J.)

(P.V.Kakade, J.)